Capacity Liability against Balkwill and Sarasota County. *See* Pet. for Writ of Cert. ("Pet."), at 32a-33a. Gooding, Bauer, Balkwill and Sarasota County[1] all separately moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. *Id.* at 33a.

In 2004, the District Court granted Respondents summary judgment in both cases as to all § 1983 claims. *Id.* at 79a-81a. The District Court found there was no constitutional violation because Petitioners' injuries were not proximately caused by the individual deputies' actions, and because the individual deputies' use of deadly force in effecting what the District Court concluded was a Fourth Amendment seizure was reasonable. *Id.* at 37a-49a. The District Court further found the individual deputies would be entitled to qualified immunity even if their actions were unconstitutional. *Id.* at 49a-54a. The District Court further found the lack of an underlying constitutional violation precluded Petitioners' claim that Gooding and Bauer failed to protect Petitioners from unconstitutional harm and Petitioners' supervisory liability claim against Gooding. *Id.* at 54a-56a. The District Court further found Balkwill was entitled to judgment as to Petitioners' official capacity claims for the following, mutually exclusive reasons: the absence of an underlying violation and the absence of a policy or custom of (1) failing to discipline deputies regarding the use of force, (2) ratifying unconstitutional conduct, and (3) failing to train deputies. *Id.* at 66a-78a.

The Eleventh Circuit affirmed, 419 F.3d 1160 (11th Cir. 2005), concluding, as the District Court had, that the driver's reckless flight caused the death and injury of Petitioners, not Bauer's decision to use deadly force. *Id.* at 13a, 22a. The Eleventh Circuit further held the Petitioners' Fourth Amendment claims

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[1] Petitioners' Civil Appeal Statement in the Eleventh Circuit indicated Petitioners disputed the District Court's conclusion that Sarasota County was not a proper party to this action. However, Petitioners have apparently abandoned this issue because the petition includes no argument on that issue, leaving Sarasota County with no argument necessitating a response. Accordingly, the petition should be denied, and summary judgment should be affirmed as to Sarasota County.

against the individual deputies failed because (1) the individual deputies did not seize the Petitioners, (2) assuming *arguendo* a seizure occurred, the force applied was reasonable, and (3) consequently, the individual deputies were entitled to qualified immunity. *Id.* at 13a-22a. Accordingly, summary judgment was affirmed as to Petitioners' supervisory liability claims against Gooding and official capacity claims against Balkwill because there was no underlying constitutional violation. *Id.* at 10a, n.5.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a decision of this Court or of any other United States Court of Appeals. Indeed, as will be shown, the opinion below is consistent with the analyses established by this Court relative to the use of force under the Fourth Amendment, qualified immunity, and official capacity claims under § 1983. Notably, Petitioners' arguments relative to the issues presented in the petition, consistent with Petitioners' arguments in the courts below, are frequently based on assumptions and conclusions having no record support, but merely masquerading as "facts." As will be shown, the undisputed record evidence reveals Petitioners have presented no basis for granting this petition. Accordingly, the petition should be denied.

I. The Eleventh Circuit applied the correct standard in determining whether the passengers in the car driven by the sole suspect sought were subjected to a Fourth Amendment "seizure" when deadly force was used in attempting to stop only the driver.

Petitioners incorrectly contend the opinion below applied the wrong standard in concluding the Petitioners were not seized under the Fourth Amendment. Petitioners assert the opinion below, instead of applying a Fourth Amendment analysis, applied a Fourteenth Amendment substantive due process analysis. Pet. at 3. However, a careful reading of the opinion below shows a Fourth Amendment analysis was correctly applied in concluding the Petitioners were not seized. As to the Fourteenth Amendment, the Eleventh Circuit, *sua sponte*, simply determined there was also no

substantive due process violation, but in addition to, and not in lieu of, the Fourth Amendment seizure analysis.

The Eleventh Circuit began its consideration of the seizure issue with the Fourth Amendment. The Court correctly noted that before there may be any discussion of the reasonableness of the force applied, it must be shown the force applied effected a "seizure," i.e. a "governmental termination of freedom of movement through means intentionally applied." Pet. at 13a-14a, citing *Brower v. County of Inyo*, 489 U.S. 593 (1989). The opinion below further indicated that only "intervention directed at a specific individual" furnishes a basis for a Fourth Amendment seizure. Pet. at 14a. The Eleventh Circuit then considered a Fourteenth Amendment substantive due process analysis. However, in the very next paragraph, the opinion below clearly applies only the Fourth Amendment standard in concluding Gooding's shot, which missed, was merely an attempted seizure, consistent with this Court's decision in *California v. Hodari D.*, 499 U.S. 621 (1991). Pet. at 15a, citing *Hodari D.* The opinion below then addresses Bauer's shots, likewise applying only a Fourth Amendment standard, as evidenced by the Eleventh Circuit's citation to this Court's discussion of the Fourth Amendment seizure issue in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Pet. at 15a.

Thus, the opinion below, after identifying both standards, and ruling out the Fourteenth Amendment, proceeds to correctly apply the Fourth Amendment standard to Gooding's attempted seizure and Bauer's use of force directed solely at the driver, concluding that neither had seized the Petitioners. Significantly, the opinion below reveals that under either theory, Fourth Amendment "seizure" or Fourteenth Amendment substantive due process, the undisputed evidence fails to establish a § 1983 claim. Accordingly, Petitioners' contention that the opinion below undermines this Court's decisions relative to Fourth Amendment seizure claims is without merit and should be rejected.

II. The Eleventh Circuit's ruling that shooting the suspect driver of an automobile does not constitute a Fourth

Amendment "seizure" of the passengers is not in conflict with this Court's precedent and the decisions of the other circuits.

Petitioners incorrectly contend that shooting a suspect driver of an automobile constitutes a Fourth Amendment seizure of the passengers. In support of their incorrect assertion, Petitioners solely, but mistakenly, rely on this Court's decision in *Brower*, 489 U.S. 593 (1989). In *Brower*, this Court held a Fourth Amendment seizure occurs only when there is a "governmental termination of freedom of movement through means intentionally applied," i.e. an intentional acquisition of physical control. *Brower*; *Lewis*, 523 U.S. 833, 844 (1998); *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003)("*Vaughan II*"). Notably, a proper reading of *Brower* provides support for the Respondents, not the Petitioners. While Petitioners urge *Brower* supports the argument that an "unintended person" can be seized, a close reading of *Brower* such "unintended person" must still be subjected to force intentionally applied to him, as where police intentionally restrain an innocent person mistakenly believed to be the suspect sought. *Brower*, citing *Hill v. California*, 401 U.S. 797 (1971). Conversely, no seizure results from an accidental or unintended termination of an individual's freedom of movement. *Id.* Thus, as the opinion below correctly recognized, "it is intervention directed at a specific individual that furnishes the basis for a Fourth Amendment claim." Pet. at 14a; *Landol-Rivera v. Cruz-Cosme*, 906 F.2d 791 (1st Cir. 1990); *Medeiros v. Town of South Kingstown*, 821 F. Supp. 823 (D.R.I. 1993)(no "constructive seizure" of passenger who was unintended object of police pursuit). Similarly, no seizure occurs where police make a show of authority but the subject does not yield. *Hodari D.*, 499 U.S. at 626-629 ("neither usage or common law tradition makes an attempted seizure a seizure"); *Adams v. City of Auburn Hills*, 336 F.3d 515 (6th Cir. 2003); *Lewis*, 533 U.S. at 845, n. 7. Indeed, "unless the officer's show of authority succeeds in restraining the person, the person has not been 'seized' within the meaning of the Fourth Amendment." *Latta v. Keryte*, 118 F.3d 693 (10th Cir. 1997); *Hodari D.*

In *Lewis*, this Court found no seizure of a non-suspect passenger where a police chase resulted in the death of the non-

suspect passenger on a motorcycle driven by the subject of a police pursuit, because the police pursuit was not intended to seize the non-suspect passenger. *Lewis*, 523 U.S. at 844, citing *Hodari D.*, 499 U.S. at 626 and *Brower*, 489 U.S. at 596-597; *Landol-Rivera* at 796. The police vehicle crashing into the non-suspect passenger after the motorcycle wrecked did not constitute means intentionally applied for the purpose of seizing the non-suspect passenger. *Lewis*, 523 U.S. at 844. This Court based its conclusion on the police officers' intent to stop the motorcycle, but not to seize the non-suspect passenger. *Id.* In contrast, the Eleventh Circuit, in *Vaughan II*, consistent with *Lewis*, held a Fourth Amendment seizure occurred where a deputy fired his weapon at a vehicle during a high speed pursuit, with the intent to "disable either the truck or [the driver]" for the purpose of seizing a suspect who was a passenger in the truck. *Vaughan II* at 1328-1329. The deputy's shot disabled neither the truck nor the driver, but it struck the passenger, who was the actual suspect the deputies sought to arrest. *Id.* Thus, the use of force achieved the result sought, the apprehension of the suspect, i.e. passenger. As the Eleventh Circuit declared:

> [T]he Supreme Court has held that it is enough "that a person be stopped by the very instrumentality set in motion …in order to achieve that result." That standard has been met in this case. Cox **fired his weapon to stop Vaughan** [the passenger] and Rayson, and one of those bullets struck Vaughan. **Because Vaughan was hit by a bullet that was meant to stop him, he was subjected to a Fourth Amendment seizure.**

Id. at 1329, internal citations omitted, emphasis added. Accordingly, the Eleventh Circuit concluded the plaintiff in *Vaughan II* was seized even though the immediate target of the shot was the vehicle and/or the driver because (1) the passenger plaintiff was the actual suspect the deputies sought, (2) the shot's purpose was to apprehend the suspect, i.e. passenger, and (3) the suspect was "stopped by the very instrumentality set in motion or put in place to achieve that result." *Vaughan II* at 1329, citing

Brower, 489 U.S. at 599. *Lewis* and *Vaughan II* thus demonstrate a Fourth Amendment seizure inquiry must focus on three facts: (1) identifying the intended object of the use of force, (2) identifying the intended purpose of the use of force, and (3) determining whether the result of the use of force was the intended result. At bar, these facts are undisputed. They demonstrate, as the opinion below correctly held, Petitioners were not "seized" by the individual deputies, thereby negating any Fourth Amendment application to this case.

1. Passengers were never intended objects of the use of force.

Unlike *Vaughan II*, the Petitioners were never the deputies' intended objects. It is undisputed the driver, Hart, was the only intended object of the use of force by both Gooding and Bauer. The arrest warrant identified only Hart as an object of the warrants. The SWAT planning and briefing focused solely on arresting Hart. The sole direction given during the briefing was to arrest Hart and secure the house. Indeed, no evidence shows any passenger was expected to be present, was identified by SWAT as engaged in threatening conduct, or was even seen by Bauer when he shot Hart. Inexplicably, Petitioners continue to adhere to the baseless conclusion that Bauer knew there were two passengers inside the vehicle when he shot at Hart. Pet. at 6. However, as shown, the undisputed record evidence reveals Bauer, standing in front of a rapidly accelerating car, shouting commands to stop with his gun drawn and pointed at the driver, whom he recognized as Hart, saw no passenger as he narrowly avoided being struck by the car and aimed his weapon at Hart.

Remarkably, Petitioners also continue to adhere to the inaccurate assumption that Gooding and Bauer believed the passengers, whom Bauer did not even know were in the car, to be "criminal suspects." Pet. at 6. Petitioners continue to rely on inconsequential labels in support of their contention they were seized. However, the only consequential label under the Fourth Amendment is whether the person is the "intended object" of the use of force. *Brower*, 489 U.S. at 596. Moreover, Petitioners'

assertion is factually incorrect, relying on factual assumptions based on three isolated, post-incident comments by Bauer and Gooding as support for their mistaken contention that Bauer and Gooding intended to seize Petitioners. It appears that Petitioners continue to rely first on Bauer's statement to CIB investigators, describing the deployment of SWAT to its staging area, "[w]e got to Temple Beth Shalom a very short time [later] because we were told that the suspects had entered a vehicle in front of the residence." Petitioners further rely on Bauer's CIB statement again, where Bauer later stated he was "watching the bad guys" during the encounter in the driveway. Lastly, Petitioners rely on Gooding's *post-incident* Use of Firearms Report, where he wrote that with knowledge of "two other *subjects*" he shot at a rear tire "in an attempt to prevent prolonged flight." On their face, none of the post-incident comments relied on by Petitioners demonstrates any intent to seize the passengers. Gooding's use of the term "subjects" does nothing to communicate intent. Indeed, Gooding, as the on-scene SWAT commander, described the passengers as simply two additional persons, i.e. "subjects" riding in Hart's car. Moreover, the mere use of what clearly is nothing more than colloquial police parlance in collectively describing the car's three occupants after the fact, simply does not establish an intent to seize all the car's occupants. This is particularly true where, as here, the plan's sole focus was Hart. Conspicuous by its continued absence is any effort of Petitioners to attach any factual significance to these post-incident references relative to the incident as it occurred. The reason for this is because they cannot.

2. Stopping the threat of Hart's aggressive driving was the purpose of the use of force.

The purpose of the use of force was to stop the threat posed by Hart's aggressive driving to the safety of deputies at the scene and in the immediate vicinity, as well as the public, not the apprehension of the passengers, i.e., Petitioners. Gooding's use of force was intended to alleviate what Gooding and others had determined was a threat of serious harm to deputies and others presented by Hart's aggressive driving. Gooding observed Hart had demonstrated a willingness to flee despite the risks to himself

and others, and concluded that Hart's continued aggressive driving created a serious risk of harm to both the deputies and the public. Notably, Gooding's thought process in deciding whether to use force considered the safety of the car's passengers. Gooding did not shoot at the driver in part because the passengers were in his line of fire. Similarly, Bauer's use of force was intended to stop Hart from driving the car in a manner that created a threat of serious harm to Bauer, other deputies and the public. As the incident unfolded, Bauer observed deputies moving to avoid being struck or forced into trees by the car as it moved from the driveway into the front yard. Bauer narrowly avoided being struck by Hart, who was still accelerating through the front yard and continuing to pose a serious threat of harm to anyone he "was going to encounter once he left that yard." Further, it is undisputed Bauer, who was originally located across the yard, did not even see any passengers when he fired his weapon.

3. The continued, aggressive driving by Hart was not the result intended by the use of force.

The undisputed facts show the passengers, i.e. Petitioners, were not stopped by the deputies' use of force. Rather, the driver's continued flight constituted an intervening cause of Petitioners' injuries. *See* Issue IV, *infra*. Thus, the result the deputies sought, the alleviation of the threat posed by Hart's aggressive driving, simply was not achieved by the deputies' use of force because Hart continued to aggressively drive away from the residence well after the shots were fired. It is undisputed Gooding's shot, intended for a rear tire, missed and hit nothing. Following Gooding's shot Hart, undeterred, continued his aggressive driving. Thus, Gooding's show of authority, which did not stop or otherwise restrain anybody, at most could amount to nothing more than an attempted seizure, which this Court has established cannot constitute a seizure. *Hodari D.* **Accordingly, Gooding's shot is of no legal consequence**. It is further undisputed that though one of Bauer's shots hit the driver, the driver continued undeterred to drive the car away from the residence and onto Bahia Vista, heading west. Thus, Bauer's "show of authority" similarly failed to alleviate the threat posed by Hart's aggressive driving as he drove away from the

residence. Indeed, the threat posed by Hart's continued aggressive driving was actually realized by the car's collision with the concrete wall and pole.

Accordingly, Petitioners' injuries were not even the result of the deputies' use of force. As the opinion below affirmed, "Hart's decision-making and reckless driving" were the sole cause of Peititoners' injuries. Pet. at 10a-13a, 37a-38a. Consistent with *Lewis*, *Vaughan II*, and the cases discussed *infra*, no "seizure" is produced by unintended events following, but not caused by the use of force.

In addition to being a correct decision, and contrary to Petitioners' assertion, the opinion below is not in conflict with the two circuit level decisions cited in the petition. A close reading of the opinion below and the Sixth Circuit's opinion in *Fisher v. City of Memphis*, 234 F.3d 312 (6th Cir. 2000), reveals the two cases are factually distinguishable, not that each has applied a conflicting standard as to what constitutes a Fourth Amendment seizure. In *Fisher*, a police officer trying to avoid being hit by an oncoming car, "jumped onto the hood of his police car, simultaneously firing his gun at the car." *Fisher* at 315. The Sixth Circuit determined the car "was the intended target of [the officer's] intentionally applied exertion of force." *Id.* at 318-319. In targeting the car, the Sixth Circuit concluded the police officer intended to stop the car, "effectively seizing everyone inside, including the [passenger]." *Id.* Notably, in *Fisher*, the officer "was not attempting to distinguish between Ms. Fisher [plaintiff] and Ms. Becton [driver]." *Id.* at 318, n. 3. In contrast to *Fisher*, which described the sudden, indiscriminate shooting at a car, the instant case undisputedly involves the controlled and limited use of force by deputies who consciously distinguished between the driver and the passengers. Indeed, in at least four separate instances deputies considered shooting to stop Hart but did not shoot because the passengers were in the potential line of fire. Thus, unlike *Fisher*, the three shots fired in this case were not the product of a sudden, indiscriminate intent to seize a car and all its occupants. Rather, the shots taken in this case were the product of a distinguishing intent

that separated the sole intended object, Hart, from the other individuals, i.e., the passengers.

In the only other Circuit level case Petitioners rely on in arguing a conflict, *Jamieson v. Shaw*, 772 F.2d 1205 (5th Cir. 1985), the Fifth Circuit held the plaintiff had stated a Fourth Amendment claim in alleging she was "seized" when police officers deliberately placed a roadblock in front of the car "in which they knew she was a passenger." *Jamieson* at 1210. The Fifth Circuit applied a broad transferred intent/constructive seizure rationale, concluding that by setting up the roadblock, the police not only sought to seize the driver, but also anyone else in the vehicle. *Id. Jamieson* demonstrates a factual resemblance to *Fisher*, which distinguishes *Jamieson* from the case at bar. *Jamieson* involved the use of a roadblock, a show of authority that does not distinguish between intended and unintended objects riding together in a vehicle that ultimately collides with the roadblock. Just as the officer in *Fisher* indiscriminately fired a weapon at an oncoming car, the officers in *Jamieson* indiscriminately placed a roadblock in the path of an oncoming car. Unlike *Jamieson*, which involved the indiscriminate use of force, it is undisputed at bar that Bauer, rather than indiscriminately shooting at the car, carefully and consciously shot only at Hart. Additionally, in *Keller v. Frink*, 745 F. Supp. 1428 (S.D. Ind. 1990), also cited by Petitioners, the court adopted the broad transferred intent analysis of *Jamieson* over the tighter specific intervention analysis of *Landol-Rivera*, simply concluding the intent to stop a car evidenced an intent to stop all the car's occupants. *Keller* at 1432. *Keller* is distinguishable from the instant case because the officer in *Keller* sought to seize all three individuals he observed commit a criminal act. *Id.* at 1429-1430.

As the opinion below shows, not only are unintended events occurring after, but not caused by the use of force not seizures, but also that no seizure occurs when force intentionally applied to seize one individual injures a person to whom the force was not intended. For example, in *Bublitz v. Cottey*, 327 F.3d 485 (7th Cir. 2003), the Seventh Circuit held police use of a tire-deflation device to stop a fleeing suspect, which subsequently

caused the suspect's car to collide with another car, causing injuries to the other car's occupants, was not a seizure. The Seventh Circuit concluded there was no seizure because the unintended collision between the suspect's car and the second car was not a means intended by police to stop the second car's occupants, but was an "unintended consequence" of an attempt to seize a robbery suspect. *Bublitz* at 489. Notably, the Seventh Circuit expressly rejected plaintiff's argument of "transferred intent," which contended that because a suspect's car was stopped by means intentionally applied, and that act had the further consequence of stopping plaintiff's vehicle, the defendant must have intended to stop plaintiff's car as well. *Bublitz* at 489 ("it does not follow that because [defendant] intended to stop [suspect's] car, he therefore intended to stop any other car that could potentially become involved in a subsequent collision"); *Medeiros* at 826-827 (rejecting "constructive seizure" argument in connection with inability of passenger to escape vehicle during police pursuit); *Patterson v. City of Joplin, Mo.*, 878 F.2d 262 (8th Cir. 1989).

Further, in contrast to *Vaughan II*, where the passenger was the suspect sought, cases that distinguish innocent bystanders or hostages from suspects are determinative of the seizure issue at bar. *Vaughan II* at 1328, n. 4. In *Childress v. City of Arapaho*, 210 F.3d 1154 (10th Cir. 2000), the Tenth Circuit concluded that hostages held by escaped fugitives in the hostages' vehicle were not seized when law enforcement officers, knowing of the hostages' presence, fired upon the vehicle at a roadblock, striking and injuring the hostages. Notably, the Tenth Circuit held the officers' actions were intended to restrain the vehicle and the fugitives, not the hostages inside the vehicle. *Childress* at 1157; *see also Rucker v. Harford County*, 946 F.2d 278 (4th Cir. 1991) (no seizure when officers wounded bystander in attempt to shoot the tires of fugitive's car), *Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000) (authorities cannot seize "any person other than the one who is the deliberate object of their exertion of force") and *Berg v. County of Allegheny*, 219 F.3d 261 (3rd Cir. 2000)(if officer shoots at fleeing suspect and the bullet inadvertently strikes an innocent bystander, there has been no Fourth Amendment seizure). Thus, "[t]he injuries inflicted were the unfortunate but not

unconstitutional 'accidental effects of otherwise lawful conduct.'" *Childress* at 1157, citing *Brower*, 489 U.S. at 596.

Similarly, in *Medeiros v. O'Connell*, 150 F.3d 164 (2nd Cir. 1998), the Second Circuit held a hostage, injured when police officers fired into a school van attempting to stop a suspect who had commandeered the van, was not seized. The Second Circuit explained, "where the hostage is hit by a bullet intended for the hostage-taker, the mishap is the 'unintended consequence of government action,' and the governing principle is that such consequences cannot 'form the basis for a Fourth Amendment violation.'" *Medeiros* at 169. Thus, "the deflection of the bullet intended for [the hostage-taker] did not transform the troopers' rescue efforts on the hostages' behalf into a seizure." *Id.* Lastly, in *Landol-Rivera*, the First Circuit held a hostage, who was forced at gunpoint into a car, was not seized when a shot fired at the gunman injured the hostage who was sitting directly in front of the gunman in the driver's seat. In reaching its holding the First Circuit, citing *Brower*, stated "a police officer's deliberate decision to shoot at a car containing a robber and a hostage for the purpose of stopping the robber's flight does not result in the sort of willful detention of the hostage the Fourth Amendment was designed to govern." *Landol-Rivera* at 795; *United States v. Lockett*, 919 F.2d 585 (9th Cir. 1990); *Milstead v. Kibler*, 243 F.3d 157 (4th Cir. 2001).

Accordingly, Petitioners were not seized because (1) Petitioners were never the intended objects sought by the deputies' use of force, (2) physical control of Petitioners was not obtained by the deputies' use of force, and (3) the three shots failed to alleviate the threat posed by Hart's aggressive driving, which continued despite the shots. Consistent with this Court's analysis in *Lewis*, and consistent with the decisions of the Eleventh Circuit (*Vaughan*), the Tenth Circuit (*Childress*), the Ninth Circuit (*Lockett*), the Eighth Circuit (*Patterson*), the Seventh Circuit (*Bublitz*), the Sixth Circuit (*Claybrook*), the Fourth Circuit (*Rucker*), the Third Circuit (*Berg*), the Second Circuit (*Medeiros*) and the First Circuit (*Landol-Rivera*), § 1983 liability simply cannot attach to injuries that follow, but are not caused or intended by the use of force. Accordingly, because there is no conflict

between the opinion below and the decisions of this Court and the other circuits, the petition should be denied.

III. Distinguishing what a reasonable officer "could have believed" with what a reasonable officer "would have believed" constitutes a distinction without a difference in analyzing whether the use of deadly force is "reasonable" under the standard set forth in *Graham v. Connor*, 490 U.S. 386 (1989).

Because the undisputed facts show that Petitioners were not subjected to a Fourth Amendment seizure, the Eleventh Circuit was not required to analyze whether the deputies' use of force was objectively reasonable under the Fourth Amendment. Thus, any discussion of the objective reasonableness standard in the opinion below is strictly hypothetical. Indeed, the opinion below states that assuming *arguendo* a seizure had occurred, the Eleventh Circuit agreed with the District Court's determination that the force used by the deputies was objectively reasonable. Pet. at 16a. Similarly, in discussing whether the deputies were entitled to qualified immunity, the opinion below couched its discussion as again assuming *arguendo* a seizure had occurred. *Id.* Thus, as this Court has established that it "does not sit, however, 'to decide abstract, hypothetical or contingent questions,'" *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 284 (1969), any discussion of Petitioners' displeasure about the hypothetical discussion of the objective reasonableness standard in the opinion below is not legally germane to this Court's weighing the merit of the instant petition.

Notably, Petitioners do not quarrel with the District Court's objective reasonableness analysis, which was approved by the opinion below.[2] Pet. at 40a-42a. The District Court's analysis followed this Court's three prong analysis under *Graham*, examining (1) the severity of the crime at issue, (2) whether the

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[2] Petitioners limit their dispute with the opinion below on this point to the Eleventh Circuit's discussion of qualified immunity, the only portion of the opinion below cited relative to their argument. Pet. at 8.

suspect posed an immediate threat to the safety of the officers or others, and (3) whether [the suspect] was actively resisting arrest or attempting to evade arrest by flight. Pet. at 42a-44a, citing *Graham*, 490 U.S. at 396. The District Court's analysis concluded the deputies' actions met the objective reasonableness standard, noting first "**potential criminal activity** occurring in or around the residence was sufficiently severe to satisfy the first prong of the *Graham* analysis." Pet. at 46a (emphasis added). Next, while the District Court acknowledged traffic had been blocked off in the immediate vicinity of the incident scene, "[h]owever, **the possibility of harm to the public** was not eliminated – Bahia Vista is a residential street that connects nearby with heavily-traveled U.S. 41." *Id.* (emphasis added). "Thus, had Hart successfully fled from the scene, his path of flight **could have posed a threat** of death or serious injury to the public." *Id.* (emphasis added).

The cases cited by Petitioners in support of their assertion of a substantial difference between the words "could" and "would" are of dubious value. *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994), cited by Petitioners, is a criminal case, with no discussion of the Fourth Amendment objective reasonableness standard. *MacFarlane v. Life Ins. Co. of No. America*, 999 F.2d 266 (7th Cir. 1993), is an insurance policy interpretation case. Moreover, none of the cases Petitioners cite for the so-called "would have" standard identify any purported split of authority or discredit any so-called "could have" standard. Pet. at 9. Similarly, none of the cases Petitioners cite for a "could have" standard identify any purported split of authority or discredit any "would have" standard. *Id.* Indeed, one of the cases Petitioners cite, *Jones v. Webb*, 45 F.3d 178 (7th Cir. 1995), uses both "could" and "would" in discussing the objective reasonableness standard. Thus, while Petitioners argue the terms are not interchangeable, the cases Petitioners cite demonstrate that at least three circuits use the terms interchangeably, with none of those circuits acknowledging any substantive difference between the terms. Thus, Petitioners assertion of a purported split of authority fails to identify a single case where the two "standards" are acknowledged, compared, or where either standard is expressly approved or rejected.

Curiously, Petitioners take issue with what it describes as the speculative analysis in the opinion below. Pet. at 11. However, speculation and assumption are what Petitioners rely on in support of their incorrect contention that "Hart's path of flight" did not pose a threat of serious harm to the officers and the general public. Pet. at 13. Petitioners incredibly maintain Hart's operation of the vehicle did not pose an immediate threat of harm to the deputies when it is undisputed Hart had struck two deputies during his escape, nearly struck others, including Bauer, and after leaving the yard, maneuvered his car around another deputy parked in an unmarked patrol car. Contrary to Petitioners' baseless assertion, Hart was a constant threat of harm to everyone in the vicinity once he started the car and began his reckless escape. Further, Petitioners argue "no civilian was endangered by Hart's operation of the vehicle." *Id.* at 14. This assertion overlooks the fact that the threat posed by Hart's continued aggressive driving was actually realized by the car's collision with the concrete wall and pole.

Because the opinion below discussed objective reasonableness hypothetically, this Court is not obligated to do the same. Even if this Court were to review this portion of the opinion below, Petitioners' assertion of a purported split of authority fails to identify a single case acknowledging the split. Contrary to Petitioners' baseless assertions, neither of the terms "could" or "would" substantively alter the objective reasonableness standard. Accordingly, Petitioners' assertion of a purported split is without merit and should be rejected.

IV. The Eleventh Circuit's conclusion that a suspect's decision to avoid arrest through vehicular flight constitutes an independent, intervening cause when the suspect's decision preceded the use of force and continued unabated following the use of force is not in conflict with decisions of the other circuits.

The opinion below correctly affirmed the District Court's conclusion that Hart's reckless driving was an independent, intervening cause of the passengers' injuries. Pet. at 10a-13a. In affirming, the opinion below recognized Hart began his escape

before any shots were taken, continued as the shots were taken, and continued unabated after the shots, interrupted only by Hart's crashing into a pole nearly a half mile from the driveway. *Id.* at 12a. There is no evidence the deputies did anything to deter Hart from his initial pre-shot decision to escape. Indeed, "Hart's behavior prior to the shots establishes that he had no intention to drive safely regardless of whether shots were fired." *Id.* at 13a.

Petitioners incorrectly interpret the opinion below as causing future vehicular flight cases to result in a finding of no liability based on a lack of proximate causation. A comparison between the case at bar and a Florida case cited by Petitioners demonstrates no such broad based rule has been established. In *City of Pinellas Park v. Brown*, 604 So. 2d 1222 (Fla. 1992), the Florida Supreme Court noted that the driver drove recklessly *after* being pursued by police, i.e. the police pursuit caused the driver to react by driving recklessly. Here, Hart operated the vehicle recklessly before any shots were fired. Thus, it cannot be said that but for the shots, Hart would not have attempted to escape. Indeed, Hart was already attempting to escape before the shots were fired. Indeed, the undisputed facts offer greater support for the proposition that but for Hart's reckless and dangerous escape, no shots would have been fired. Moreover, Petitioners incorrectly assert that the opinion below marks the first time a federal appellate court "espoused the view that a suspect's decision to avoid arrest through vehicular flight constitutes an 'intervening cause.'" Pet. at 15. Indeed, in *Carl v. City of Overland Park*, 65 F.3d 866 (10th Cir. 1995), the Tenth Circuit espoused a conclusion similar to the opinion below; that the decision to evade arrest by initiating a high speed police chase was an intervening cause.

Petitioners continue to offer baseless assumptions as a substitute for facts in arguing Bauer's shots "undoubtedly caused Hart to panic and flee the residence at a much higher rate of speed." Pet. at 17. The undisputed facts lend more support to the notion that the higher rate of speed could be the result of Hart now driving on less resistant pavement rather than across a sandy front yard, not that Hart panicked, another assertion by Petitioners for which there is no record support. Further, Bauer's shooting of Hart

did not prevent Hart from leaving the front yard, rapidly accelerating, braking as he approached an unmarked patrol car, turning to avoid colliding with the unmarked patrol car, going up onto the sidewalk, with at least one deputy witnessing Hart trying to steer the car, and the brake lights flashing a second time just prior to crashing into a pole. Petitioners attempt to minimize the fact that Hart continued to operate the car after being shot. However, Hart's continued operation of the car underscores the inability of the shots to deter Hart from his pre-shot decision to escape. Indeed, as to Hart's operation of the vehicle after being shot, Petitioners incredibly contend the car crashed less than ten seconds after Hart was shot, 0.3 miles from the scene, when no record evidence suggests Hart was traveling at nearly 120 miles per hour, the speed Hart would have been traveling if Petitioners' contentions as to time and distance after Hart was shot are correct.

Lastly, Petitioners incorrectly argue the question of proximate cause where there is an independent, intervening cause is exclusively a jury question. Pet. at 18. To the contrary, Florida law, the law applicable to the question when it was before the Eleventh Circuit,[3] has determined:

> Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether defendant should be legally responsible for the injury. Unlike the fact of causation with which it is often hopelessly confused, this is primarily a problem of law.

Dept. of Transportation v. Anglin, 502 So.2d 896 (Fla. 1987). The cases Petitioner cites from the Second and Sixth Circuits on this issue are inapposite as they do not address how Florida law

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[3] Although proximate causation under § 1983 is a question of federal law, in determining the meaning of the concept courts look to state tort analogs, inasmuch as this Court has made ... "clear that principles of causation borrowed from tort law are relevant to civil rights actions." *Barnes v. Anderson*, 202 F.3d 150 (2nd Cir. 1999), citing *Malley v. Briggs*, 475 U.S. 335, 344 n. 7 (1986).

addresses the issue. Thus, contrary to Petitioners' assertion, the Eleventh Circuit's determination that Hart's actions were the independent, intervening cause of the passengers' injuries was not a premature one.

V. The Eleventh Circuit's qualified immunity analysis followed this Court's standard established in *Saucier v. Katz*, 533 U.S. 194 (2001), when the Eleventh Circuit determined that because the deputies' conduct did not violate a constitutional right, there was no need to determine whether the deputies' conduct violated clearly established law.

The opinion below correctly held Gooding and Bauer were entitled to qualified immunity because neither Gooding nor Bauer had violated a constitutional right. The Eleventh Circuit followed this Court's analysis in *Saucier*, 533 U.S. 194 (2001), where a two step analysis may be required. The opinion below correctly sets forth that analysis as follows: "The first step is to determine whether the facts '[t]aken in the light most favorable to the party asserting the injury ... show the officer's conduct violated a constitutional right[.]' **If the conduct did not violate a constitutional right, the inquiry ends there.** If the conduct violated a constitutional right, a court must move on to the second step and determine 'whether the right was clearly established.' " Pet. at 16a-17a (emphasis added). Curiously, Petitioners neglected to identify the emphasized part of the qualified immunity analysis set forth, *supra*. Indeed, the opinion below agreed with the District Court's determination that the undisputed facts failed to show either Gooding[4] or Bauer violated a constitutional right, at which point the qualified immunity analysis ends under *Saucier*. *Id.* at 21a-22a.

Petitioners emphasize *Saucier* requires courts view the facts in the light most favorable to the non-moving party. Notably, the Eleventh Circuit reviewed the case at bar as an appeal of a

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[4] Petitioners' references to Gooding are of no legal consequence because it is undisputed that Gooding's single shot missed, and this Court has established that an attempted seizure cannot establish a Fourth Amendment violation. *Hodari D.*

summary judgment, which already requires the facts be viewed in a light most favorable to the Petitioners. Pet. at 10a.; Fed. R. Civ. P. 56. However, Petitioners continue to rely on conclusory assumptions rather than record facts in arguing this point. For example, Petitioners surprisingly continue to assert that not only did Bauer know there were passengers in Hart's car, but that the passengers and Hart were unarmed. Pet. at 21. However, the record evidence simply does not support Bauer seeing any passengers or being otherwise aware of them when he fired two shots at Hart. Moreover, there is no record evidence indicating that any SWAT member could have conclusively known whether anyone in the car was armed. Petitioners further assert "Bauer conceded that he fired his weapon solely out of concern for his own safety." *Id.* This purported statement of fact is plainly inaccurate, as Bauer testified that he used force in self-defense, defense of others and to prevent escape, any one of which makes force justified. Petitioners further assert the "evidence" below demonstrated "the sworn testimony of numerous witnesses stating that no officers or civilians were in the path of the moving vehicle when Bauer fired his weapon." Pet. at 20. However, this assertion ignores the testimony of Bauer, who reasonably believed the public and other officers were at risk of harm from Hart's reckless driving, and Regina Wetherington, who believed someone was going to be seriously injured by Hart's reckless driving. Lastly, in one of the more blatant misstatements Petitioners assert as fact, Petitioners cite the Eleventh Circuit's determination that "'Bauer was directly in Hart's path' when he fired his weapon." Pet. at 20. However, the opinion below plainly states, "Bauer was directly in Hart's path as the Oldsmobile accelerated toward him." *Id.* at 20a.

Moreover, viewing the facts in a light most favorable to Petitioners, the record evidence simply does not support the baseless contention that Hart was unarmed, non-dangerous, and posed no immediate threat of harm to anyone. The record evidence demonstrates the contrary. As shown, the facts do not support any officer conclusively knowing any occupant of the car was unarmed. Hart, himself, was "armed" with an automobile that he was undisputedly operating in a reckless manner. Indeed, the record evidence shows Hart's reckless driving caused two deputies to be struck by the car in the front yard, and others to be narrowly

missed. Clearly, to characterize Hart, a felon out on bail after being charged with attempted murder who responded to the deputies' commands to surrender with reckless driving in order to escape, as non-dangerous is to thoroughly disregard the record evidence to the contrary. Thus, even viewing the facts in a light most favorable to the Petitioners, which is what the Eleventh Circuit did, the opinion below correctly determined Gooding and Bauer had not violated a constitutional right; at which point the qualified immunity analysis concludes, consistent with this Court's decision in *Saucier*.

VI. Whether fair notice is provided by *Tennessee v. Garner*, 471 U.S. 1 (1985), that it is unlawful to use deadly force against a fleeing suspect set on evading arrest through vehicular flight where the suspect's car already struck two officers and was a few blocks away from a busy six-lane highway, thereby posing an immediate threat to the general public.

As shown, because the Eleventh Circuit correctly determined Gooding and Bauer had not violated a constitutional right, it was not legally necessary to examine whether the law provided fair warning that the deputies' conduct was unconstitutional. However, Petitioners continue to argue under the baseless premise that Hart was unarmed, non-dangerous, and posed no immediate threat of harm to anyone, and that, accordingly, using deadly force to stop him was unconstitutional under this Court's decision in *Garner*, 471 U.S. 1 (1985). In *Garner*, this Court established that deadly force is "reasonable" under the Fourth Amendment when an officer "(1) has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others or that he has committed a crime involving the infliction or threatened infliction of serious physical harm; (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given some warning about the possible use of deadly force, if feasible." *Garner*, 471 U.S. at 8-9.

Petitioners reliance on this Court's decision in *Brosseau v. Haugen*, 543 U.S. 194 (2004), is inexplicable for two reasons.

First, this Court established that qualified immunity analysis calls for courts to determine whether the law, in relation to the specific facts confronting the officer **when he acted**, was clearly established. *Anderson v. Creighton*, 483 U.S. 635 (1987). There is no dispute the acts at issue occurred on September 30, 1999, approximately five years before this Court's decision in *Brosseau*. Thus, *Brosseau* cannot inform Gooding and Bauer as to the constitutionality of their acts on the date of the incident. Accordingly, Petitioners' reliance on *Brosseau* is misplaced and should be rejected. Second, assuming *arguendo Brosseau* was relevant to the qualified immunity inquiry in this case, Petitioners dubiously cast the case at bar as an "obvious case" where the fleeing suspect did not pose an immediate threat of death or serious harm to the officer or others. Pet. at 23. In *Brosseau*, the officer believed the suspect was armed and posed an immediate threat of serious harm to officers and others, some of whom were within a few feet of the suspect's car. Petitioners argue that because the case at bar does not match *Brosseau* factually; it must factually match the "obvious case" that violates the *Garner* standard. Petitioners' argument adheres to the baseless assumption that neither Gooding nor Bauer had probable cause to believe Hart posed an immediate risk of death or serious harm to any officer or the general public.

Even if one could debate Bauer's judgment it cannot be said there was absolutely no basis for Bauer to think probable cause existed. Indeed, Hart's aggressive, reckless driving, his use of the car as a weapon to cause deputies to jump to avoid being struck undisputedly involved the threat of serious harm. Further, Bauer knew of Hart's history of violence, including attempted murder, and the real risk Hart presented to anyone down the road, including at least one officer in an unmarked patrol car in the next intersection whom Hart maneuvered to avoid striking prior to crashing into a pole. The exigencies of the situation facing Bauer did not permit the lawyerly debate in which Petitioners engage to minimize the threat Hart posed to anyone whose path he crossed. Similarly, Gooding testified that before he shot at a rear tire he was concerned for his own safety and the safety of other SWAT members standing in close proximity to Hart's car as it began its reckless flight attempt. To conclude Gooding and Bauer did not

have probable cause to use force against Hart in this dangerous situation is to disregard the record evidence that both deputies concluded Hart posed a serious risk of harm to themselves and others. Of course, as shown, it was not necessary for the Eleventh Circuit to determine whether the officers had fair warning as to the constitutionality of their conduct as the Eleventh Circuit correctly concluded, based on the undisputed record evidence, that neither Gooding nor Bauer had violated any constitutional rights. Moreover, even assuming *arguendo* a constitutional violation had occurred, and that this Court had ruled in *Brosseau* at the time of the incident at bar, the law was not clearly established that Gooding and Bauer's conduct was unconstitutional.

VII. The Eleventh Circuit's determination that summary judgment was appropriate in an official capacity claim under 42 U.S.C. § 1983 where no underlying constitutional violation occurred is not in conflict with decisions of the other circuits.

Contrary to Petitioners' erroneous assertion, the opinion below did address the Petitioners' claims of "municipal liability" under § 1983. Petitioners sought to establish municipal, i.e. official capacity liability under three theories: (1) a purported "persistent failure to discipline"; (2) ratification; and (3) failure to train. In addressing those claims, the opinion below followed this Court's analytical standards in correctly affirming the dismissal of Petitioners' official capacity claims.

This Court has established that suits against government officials in their official capacities are actually suits against the governmental entity the officials represent. *Kentucky v. Graham*, 473 U.S. 159 (1985). Thus, the official capacity claims against Balkwill are actually claims against him as Sarasota County Sheriff, an independently elected constitutional officer. Fla. Const. Art. VIII § 1(d); *see also* § 2.4, Charter, Sarasota County. To establish § 1983 liability against an official in his official capacity, a plaintiff must demonstrate a "policy or custom" of the governmental entity was the moving force *of a constitutional violation. Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). However, no § 1983 liability attaches to a governmental entity if

the underlying actions of the individuals caused no constitutional injury.[5] *Heller*, 475 U.S. 796 (1986); *Baker v. McCollan*, 443 U.S. 137, 140 (1979)(underlying constitutional injury must be shown before any consideration may be given the entity's policy or custom). Thus, Petitioners must show Gooding and/or Bauer caused a constitutional deprivation before there may be any examination of a policy or custom of the Sheriff under § 1983. As the Eleventh Circuit correctly held, Petitioners could not show a constitutional deprivation by Gooding or Bauer. Thus, consistent with this Court's standard, there was simply no legal basis to consider the policies or customs of the Sheriff.

Further, the Eleventh Circuit's declining to examine the policies and/or customs of the Sheriff in light of determining there was no underlying violation is consistent with decisions from the other circuits addressing the same issue. *Trigalet v. City of Tulsa*, 239 F.3d 1150 (10th Cir. 2001); *Fairley v. Luman*, 281 F.3d 913 (9th Cir. 2002); *Wilson v. Spain*, 209 F.3d 713 (8th Cir. 2000); *Durkin v. City of Chicago*, 341 F.3d 606 (7th Cir. 2003); *Bowman v. Corrections Corp. of America*, 350 F.3d 537 (6th Cir. 2003); *Alpha v. Hooper*, 2006 WL 337458 (5th Cir. Feb. 15, 2006); *Altman v. City of High Point*, 330 F.3d 194 (4th Cir. 2003); *Grazier v. City of Philadelphia*, 328 F.3d 120 (3rd Cir. 2003); *Curley v. Village of Suffern*, 268 F.3d 65 (2nd Cir. 2001); *Jarrett v. Town of Yarmouth*, 331 F.3d 140 (1st Cir. 2003).

A. Section 1983 Failure to Discipline and Ratification Claims

Moreover, assuming *arguendo* a constitutional violation occurred, the Eleventh Circuit correctly affirmed the District Court's conclusion, based on the investigations conducted by the Sheriff's Criminal Investigations Bureau and Shooting Review Board, the State Attorney, and the United States Department of

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[5] Similarly, in the absence of an underlying violation, the opinion below did not need to go any further in analyzing Petitioners' claim of supervisory liability under § 1983 against Gooding, as such a claim fails as a matter of law in the absence of an underlying violation. *Polk County v. Dodson*, 454 U.S. 312 (1981).

Justice, that the actions of Gooding and Bauer did not warrant disciplinary action. Pet. at 68a-73a. Further, even if disciplinary action had been warranted, Petitioners failed to demonstrate the Sheriff had "persistently failed to take disciplinary action such that he has established a custom ratifying use of force." *Id.* at 72a. Petitioners, however, curiously contend that "undue emphasis" was placed on the multiple investigations done after the subject incident, incorrectly asserting the District Court failed to address a purported "persistent failure to take disciplinary action in other officer-involved shooting incidents." *Id.* at 25.

Petitioners' broad based and factually unfounded assertion comes from a cursory review of instances only involving the discharge of firearms. Petitioners' unfounded assertion continues to disregard the undisputed record evidence of the Sheriff's investigation and resolution of all use of force incidents. Petitioners first reference then Sheriff Monge's deposition, where Petitioners' counsel indiscriminately referenced "20 to 30 shootings" over a period of 15 years, with no evidence to show how many of those shootings even involved shooting at suspects, as opposed to mere accidents. In fact, Petitioners continue to ignore that Monge testified in his deposition that he recalled "two or three situations" where there were findings of "wrongdoing" by deputies relative to shootings, and disciplinary action in the form of remedial training was implemented in response. Instead, Petitioners would have this Court assume all the shootings referred to during Monge's deposition were intentional despite the absence of evidence supporting that assumption. Petitioners further assume Monge's inability to recall specifically any excessive force findings or any related disciplinary action during the referenced 15-year period demonstrates there were no excessive force findings or any related disciplinary action when Petitioners present no evidence to support that assumption.

Petitioners also cite the testimony of Lieutenant Crepeau, as purported evidence of a persistent failure to discipline because "'no complaint found to have merit was made against [any] Sarasota County Sheriff's deputy from 1992 to September 30, 1999' which involved the use of deadly force with a firearm or a

motor vehicle." Pet. at 26. However, Crepeau's uncontradicted affidavit testimony references records that clearly demonstrate use of force complaints made against Sarasota County Sheriff's deputies, which encompass more than just employee-involved shootings, were investigated by the Internal Affairs Unit, and where such complaints had merit, the Sheriff responded with remedial action, including discipline. Thus, Petitioners' repetition of the bare assertion there has never been a finding of "excessive force" completely and inexplicably ignores clear, undisputed, record testimony to the contrary. Notably, it is undisputed neither Petitioners nor Petitioners' sole expert independently reviewed any of the earlier officer-involved shooting investigations. Petitioners have simply continued to fail to provide a factual basis upon which to attack the adequacy of any prior officer-involved shooting investigation because Petitioners continue to offer only assumption and speculation as a troubling substitute for record evidence.

Further, Petitioners' continued reliance on statistical data alone cannot establish the existence of an actionable custom. A careful reading of the cases Petitioners offer on establishing a custom using statistical data alone shows those cases cited more than just statistical data showing a low percentage of sustained excessive force complaints. *Samples v. City of Atlanta*, 846 F.2d 1328 (11th Cir. 1988)(testimonial evidence of informally training officers to have "shoot-to-kill" attitude, which became established practice); *McCray v. City of Dothan*, 169 F. Supp. 2d 1260 (M.D. Ala. 2001)(city adopted no policy on deadly force); *Kindle v. City of Harvey*, 2002 WL 230779 (N.D. Ill. 2003) and *Robinson v. City of Harvey*, 2001 WL 138901 (N.D. Ill. 2001)(cursory policy on deadly force and investigations). Curiously, Petitioners also cite *Fiacco v. City Rensselaer*, 783 F.2d 319 (2nd Cir. 1986), as support for the proposition that the sheer volume of past complaints, regardless of their merit, may be relied upon in establishing an actionable custom. However, *Fiacco* was decided before this Court's decision in *City of Canton v. Harris*, 489 U.S. 378 (1989), which rejected the very proposition *Fiacco* stands for, that the sheer volume of past complaints, regardless of their merit, may be relied upon in establishing an actionable custom. Thus, *Fiacco*, for the proposition Petitioners assign to it, is inconsistent with the decisions of this Court and those of the Eleventh Circuit. *Gold v.*

City of Miami, 151 F.3d 1346 (11th Cir. 1998); *see also Ott v. City of Mobile*, 169 F. Supp. 2d 1301, 1311 n. 9 (S.D. Ala. 2001)(the need for more or better training may be obvious where a *pattern of constitutional violations* exists). Accordingly, Petitioners' reliance on *Fiacco* is misplaced and should be rejected.

B. Section 1983 Failure to Train Claim

Additionally, again assuming *arguendo* a violation occurred, the Eleventh Circuit correctly affirmed the District Court, which found (1) the training provided by the Sheriff regarding the use of deadly force "was adequate in relation to the tasks that the SWAT team members performed;" (2) even if the training was inadequate, Petitioners failed to prove the failure to train manifested deliberate indifference by the Sheriff to the safety of the general public; and (3) a single incident failed to establish the existence of a governmental policy predicated on a purported failure to train. Pet. at 74a-78a.

This Court has established there are "limited circumstances" in which a local government will be held liable because it inadequately trained its employees, who then infringed upon a plaintiff's constitutional rights. *City of Canton*. Those circumstances occur where the failure to train amounts to deliberate indifference to the rights of persons with whom individual government officials come into contact. *Id.* Proof of deliberate indifference cannot be established by evidence of simple or heightened negligence because deliberate indifference describes a knowing, conscious decision to do nothing in response to a pattern of prior constitutional violations. *Id.*, 489 U.S. at 389-391. A need for training "will be proven when there is sufficient evidence that: (1) the government's employees 'face clear constitutional duties in recurrent situations,' or (2) 'a pattern of unconstitutional violations exists such that the [government] knows or should know that corrective measures are needed.'" *Young v. City of Augusta*, 59 F.3d, 1160, 1172 (11th Cir. 1995). As to the first category, this Court has given only one hypothetical example of a need to train being so obvious in the absence of prior constitutional violations -- training on the constitutional limitations

on the use of deadly force where the government provides firearms to law enforcement officers. *City of Canton*, 489 U.S. at 390, n. 10. Notably, this Court does not require a government to adopt or follow any specific procedures in order to avoid § 1983 liability for failure to train. *Id.*, 489 U.S. at 390-391. In fact, this Court established it is not enough to show a particular officer was inadequately trained, or there was negligent administration of an otherwise adequate training program, or the conduct resulting in the injury could have been avoided by more or better training. *Id.* Thus, courts examine only whether the government responded to prior misconduct with remedial action, with no inquiry into the manner or quality of the government's response because this Court has instructed federal courts not to become involved "in an endless exercise of second-guessing municipal employee-training programs." *Id.* Accordingly, absent a history of prior, similar constitutional violations showing knowledge on the government's part of a need to train, no § 1983 liability attaches. *Id.*

At bar, Petitioners continue to incorrectly assert the Sheriff did not provide any training to his officers regarding the use and limitations of deadly force during motor vehicle pursuits, relying on the "testimony of no fewer than six Sarasota County law enforcement officers." Pet. at 27-28. The testimony of six witnesses cited by Petitioners focuses only on the act of "shooting at a moving vehicle," from which Petitioners continue to incredibly assert the Sheriff "did not provide any training to its officers regarding the use and limitations of deadly force during motor vehicle pursuits." A review of the undisputed record evidence plainly shows Petitioners' assertion is incorrect. Indeed, Bauer did not shoot at a moving vehicle; he shot at the driver, Hart. Gooding did not just open fire on a moving vehicle. In a very controlled, low risk attempt, Gooding shot a single bullet at the lower half of a rear tire, which he missed. Gooding and Bauer's three careful, limited shots at specific targets are clearly distinguishable from indiscriminately blasting away at a moving car. Further, the Sheriff's head of in-service training testified deputies are trained on applications of deadly force in situations involving motor vehicles, including considerations of the circumstances and consequences of shooting at a moving vehicle. Thus, Petitioners' continued assertion the Sheriff provided no training on applications of deadly

force relative to motor vehicles completely disregards the undisputed record evidence. The cases Petitioners urge provide support of their argument are inapposite. In *Cooper v. Merrill*, 736 F. Supp. 552 (D. Del. 1990) and *Frye v. Town of Akron*, 759 F. Supp. 1320 (N.D. Ind. 1991), both courts applied the "obviousness" footnote in *City of Canton* to training regarding *high-speed police pursuits*, which is not what Petitioners seek to show is "obvious" in this case.[6] Rather, Petitioners assert that training on firing weapons at motor vehicles is obvious.

The undisputed record evidence does show all the deputies involved in the incident were fully trained regarding both the legal requirements concerning the use of deadly force as well as the heightened standard under the Sheriff's internal policy on the use of deadly force. The training records, Hoffmeister's deposition, Kenney's affidavit and testimony of Gooding, Bauer and other SWAT members involved in the incident all show many hours use of force and deadly force training that included both proficiency and judgment training, i.e. learning how to shoot and deciding when it is appropriate to use deadly force, including situations involving motor vehicles. Indeed, both Gooding and Bauer demonstrated at their depositions they understood in the face of this incident they could use deadly force in a motor vehicle situation only if there was an imminent threat of serious harm or death to themselves, a fellow officer or member of the public, in addition to stopping a fleeing felon who presented a similar risk. Moreover, Petitioners' own expert acknowledged the training given was enough to equip the deputies to have decided whether to use deadly force in that particular situation. Thus, the evidence is overwhelming that the Sheriff both had a policy addressing the constitutional limitations on the use of deadly force, and provided training on those limitations. Lastly, Petitioners are unable to provide evidence of frequent, prior, similar constitutional violations regarding the use of deadly force involving motor vehicles and fleeing felons, without which the need for additional

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[6] The other case cited by Petitioners, *Kibbe v. Thurston*, 777 F.2d 801 (1st Cir. 1985), is a pre-*Canton* decision, but also discusses training relative to high-speed police pursuits, which, as shown, is not what Petitioners seek to show is "obvious" in this case.

training cannot be established. Thus, liability under § 1983 for the failure to train law enforcement officers cannot be established even if it could be shown an underlying violation had occurred.

Because the Eleventh Circuit correctly concluded there was no underlying violation, no § 1983 liability attaches to the Sheriff. This conclusion is consistent with this Court's decisions and the decisions of the other circuits, which do not require examination of an official policy or custom unless there is an underlying violation. Moreover, assuming *arguendo* a violation had occurred, the undisputed facts confirm the District Court's conclusions that Gooding and Bauer's actions did not warrant discipline, that Petitioners failed to establish a persistent failure to discipline by the Sheriff, and further failed to demonstrate this case fits the limited circumstances where a purported failure to train may establish § 1983 liability. Thus, for this additional reason, the petition should be denied.

CONCLUSION

Because the opinion below is not in conflict with the decisions of the other circuits and correctly applied this Court's standards to the issues presented, the petition should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

DIANNE TROUPE, as Personal Representative for the Estate of Ricardo Robinson, Deceased, et al.,

Petitioners,

v.

SARASOTA COUNTY, FLORIDA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

In their Opposition Brief, Respondents claim that Petitioners' arguments "are frequently based on assumptions and conclusions having no record support, . . . masquerading as facts." (Opp. Brief, at p. 3). Contrary to Respondents' claim, *every one* of Petitioners' factual statements are amply supported by the evidence, and, where appropriate, Petitioners will identify for this Court those portions of the record below that support Petitioners' arguments. Given the parties' dispute about the evidence contained in the record, Petitioners urge this Court to request that the clerk of the lower court having possession of the record certify and transmit it to this Court. Upon review of the lower court record, including the forensic evidence, photographs, incident reports and witness testimony, this Court will see that the so-called "undisputed" facts posited by the Respondents are in fact *disputed* and actually support the claims advanced by the Petitioners in the underlying lawsuit.

REASONS FOR GRANTING THE PETITION

I.

The Eleventh Circuit's Application of the Fourteenth Amendment Due Process Standard in Analyzing The "Seizure" Issue Is Not Mere Surplusage, But, Rather, Is The Underpinning Of Its "No Seizure" Determination.

Respondents make no attempt to justify the Eleventh Circuit's use of *Fourteenth Amendment* due process principles in evaluating the "seizure" issue. Instead, Respondents ask this Court to disregard the lower court's Fourteenth Amendment analysis altogether by claiming it was merely "*in addition to*" and not in lieu of, the Fourth Amendment seizure analysis. (Opposition Brief, at pp. 3-4).

There is no indication, however, in the Eleventh Circuit's opinion that its use of Fourteenth Amendment principles was merely an "*additional*" analysis which could be viewed separate and apart from the Fourth Amendment. The Eleventh Circuit's opinion in that regard (see pp. 14a-15a of Appendix to Petition) does not reveal any such intention. Rather, as is evident from the court's opinion, the Eleventh Circuit's focus on the Fourteenth Amendment was the centerpiece of that court's analysis of the "seizure" issue:

- "Force regardless of the form directed to a driver of a vehicle--particularly one attempting to flee--*does not give rise to a due process deprivation claim* unless it was exercised with 'a purpose to cause harm' unrelated to the legitimate object of arrest."

- The plaintiffs do not allege that Gooding or Bauer had the intent to cause harm unrelated to the arrest."

(Appendix 14a-15a of Petition for Writ of Certiorari).

The foregoing portions of the Eleventh Circuit's opinion appear squarely in the middle of that Court's "seizure" analysis, and there is no statement or suggestion anywhere in the Court's opinion that the above-quoted language was part of some "additional" analysis. It is the crux of the analysis on the seizure issue. Indeed, if one were to eliminate the above-quoted language, the Eleventh Circuit's analysis on the seizure issue would be incomplete. The Court's reference to the Fourteenth Amendment is puzzling inasmuch as no such claim was being asserted. The danger in allowing such an analysis to stand is obvious: it would subject victims of police excessive force--particularly in the context of vehicular pursuits--to an insuperably high standard, and one which is contrary to this Court's precedent.

II.

The Vehicle's Passengers Were Also The Intended Objects Of The Police Use of Deadly Force.

Respondents next argue that the lower court's seizure analysis was correct because Robinson and Waiters (the vehicle's passengers) were not the "intended objects" of the police use of force. The record below, however, reveals otherwise. Not only were Bauer and Gooding acutely aware of the passengers' presence inside the vehicle, but they also believed them to be **criminal suspects**, as evidenced by their statements following the shooting. (*See* D.E. 159 [Plaintiff's Statement of Disputed Facts] at ¶16; D.E. 152, Ex. 43 [Bauer CIB Statement] at SSO789 ["We got to Temple Beth Shalom a very short time because we were told that the **suspects** had entered a vehicle in front of the residence."]; at SSO791 (stating that he was "**watching the bad guys**" during the encounter in the driveway]; D.E. 152, Ex. 32 [Gooding Use of Firearms Report] at SSO747 [Gooding's statement that with knowledge of the "**two other subjects**," he shot "in an attempt to prevent prolonged flight."]). Moreover, Sheriff Monge, who at the time was the Sheriff of Sarasota County, stated in a November 9, 1999 News Release that Robinson and Waiters both "[had] **lengthy criminal records**." (D.E. 152, Ex. 67 [11/9/99 News Release] at SSO25). Based upon the foregoing statements by Bauer, Gooding and Monge, it can reasonably be inferred that the officers' actions were also directed against the two passengers, in addition to Ryan Hart.

Despite the clear import of the above statements, Respondents attempt to diminish their importance by characterizing them as "colloquial police parlance" and "inconsequential labels." (Opposition Brief, at pp. 7-8). However, there is nothing colloquial or inconsequential about the terms "**bad guys**," "**suspects** [plural, not singular], "**subjects**," and, most of all, the reference to Robinson's and

Waite[illegible]supposed "**lengthy criminal records.**" If the passen[illegible] were not also intended targets, then why mention their criminal records at all or refer to them as "bad guys"? Such statements give the clear impression that the officers were well aware of the presence of the two passengers, and considered them to be involved in potential criminal activity.

Moreover, in arguing that the actions of Bauer and Gooding did not rise to the level of a Fourth Amendment "seizure," Respondents rely exclusively on cases where the injured victim was either: (1) a "hostage" who the officers were clearly trying to avoid injuring; or (2) an "innocent bystander" injured away from the vehicle that was the intended target. (Opposition Brief, at pp. 11-13, citing *Childress v. City of Arapaho, Okla.*, 210 F.3d 1154 (10th Cir. 2000) (finding in hostage shooting case, no seizure because "the officers intended to restrain the minivan and the fugitives, not [the hostages]"); *Medeiros v. O'Connell*, 150 F.3d 164 (2d Cir. 1998) (finding no seizure occurred where hostage was struck by an errant bullet); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990) (holding that a hostage injured when police fired at a suspect's getaway car was not "seized" for Fourth Amendment purposes); *Rucker v. Hartford County*, 946 F.2d 278 (4th Cir. 1991) (bystander not seized by police bullet aimed at fleeing vehicle); *Bublitz v. Cottey*, 327 F.3d 485 (7th Cir. 2003) (no seizure where officer attempted to stop a fleeing robbery suspect by using a tire deflation device, causing the suspect to lose control of his vehicle and collide with plaintiff's minivan); *Lee v. Williams*, 138 F.Supp.2d 748 (E.D. Va. 2001) (hostage was not "seized" under Fourth Amendment when officers, intending to subdue a robbery suspect, accidentally shot hostage),

Such cases are of no relevance to the "seizure" inquiry. Petitioners were neither "hostages" nor "innocent bystanders" who were injured away from the targeted vehicle. They were in the specific vehicle that was the

"intended target" of the officers' gunfire; the officers were aware of the presence of Robinson and Waiters when they shot at the vehicle; and far from being thought of as hostages or innocent bystanders, Robinson and Waiters were considered "suspects" by both officers. (*See* District Court Docket Entry No. 152, Doc. 43, Bauer CIB Statement, at SSO789 [referring to passengers as "suspects"]; "at SSO791 [referring to occupants of vehicle as "the bad guys"]; Doc. 67, 11/9/99 News Release at SSO25 [noting the supposed "lengthy criminal records" of Robinson and Waiters]). Accordingly, the "hostage" and "innocent bystander" line of cases cited by the Respondents are wholly inapposite.

III.

Physical Control Of The Vehicle's Passengers Was Obtained Through The Police Use of Deadly Force.

Respondents next argue that there was no seizure because "physical control" of the vehicle was not obtained by the officers' use of deadly force. (Opposition Brief, at pp. 5, 7, 9 & 13). Specifically, Respondents argue that there was no Fourth Amendment seizure because the deadly force applied by Bauer and Gooding did not "succeed" in stopping the vehicle, and that the vehicle crashed solely as result of Hart's reckless driving after being shot in the back. (*Id.*, at p. 7).

Respondents' attempt to distance the shots fired by Gooding and Bauer from the deadly crash ignores the overwhelming evidence in this case that the officers used deadly force with the specific intention of disabling the vehicle, and that goal was in fact accomplished. Indeed, Hart died as a result of the gunshot wounds inflicted by Bauer and, further, the vehicle crashed a mere "five to ten seconds" after Hart was shot. (*See* D.E. 152, Ex. 21 [Weatherington Depo.] at 70:8-70:12; D.E. 152, Ex. 3 [Sarasota Police Department Investigation], at SSO1152-1154, 1189, 1199 & 1250; D.E.

152, Ex. 9 [Medical Examiner's Autopsy Report of Ryan Hart], at SSO725; D.E. 152, Ex. 7 [Medical Examiner's Report], at SSO0719). It can reasonably be inferred from this evidence that the officers' use of deadly force was one of the causes--if not the leading cause--of the crash, and that had the officers refrained from shooting, the vehicle would almost assuredly not have crashed. Thus, there is no merit to Respondents' specious claim that "physical control" of the Petitioners was not obtained by the officers' use of deadly force. *See, e.g., Ivory v. City of Minneapolis*, 2004 U.S. Dist. LEXIS 15199, at *4 & *12 (D. Minn. Aug. 4, 2004) (passengers of vehicle were "seized" even though vehicle crashed several blocks away from where shots were fired).

IV.

Gooding is Legally Responsible for Petitioners' Catastrophic Injuries Even Though His Shot "Missed."

Respondents next argue that the Gooding's "missed shot" is of no legal consequence. (Opposition Brief, at p. 9). Such an argument is contrary to well-established case law. Under the analytical approach espoused in virtually every circuit court of appeals, Gooding, despite the missed shot, would still be legally responsible for Robinson's and Waiter's injuries by virtue of the fact that: (1) Gooding "acted in concert" with Bauer and the other SWAT team members, and their collective actions were part of a "team effort," *see, e.g., Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989); *Grandstaff v. Borger*, 767 F.2d 161, 168 (5th Cir. 1985); (2) Gooding was Bauer's immediate "supervisor" and personally participated in the incident, thereby giving rise to "supervisory liability" under section 1983, *see, e.g., Jeffers v. Gomez*, 267 F.3d 895, 915 (9th Cir. 2001); *Worrell v. Henry*, 219 F.3d 1197, 1214 (10th Cir. 2000); and (3) Gooding caused Robinson and Waiters to be subjected to a deprivation of protected rights by "setting into motion the

series of events" which Gooding knew or reasonably should have known would result in the constitutional deprivation. *See, e.g., Sales v. Grant*, 158 F.3d 768, 776 (4th Cir. 1998); *Cartagena*, 882 F.3d at 560-61. Therefore, despite the Respondents' argument to the contrary, any one or more of the foregoing cognizable theories permits the imposition of individual liability on a law enforcement officer even where he does not discharge his firearm, let alone shoot and miss.

V.

The "Would/Could" Issue Is Not Merely A Distinction Without A Difference, As The Federal Courts Have Acknowledged This Issue In Fourth Amendment Cases.

In the portion of their brief directed to the "reasonableness" inquiry under *Graham v. Connor*, Respondents make several inaccurate statements. First, they claim that the "*could have*" versus "*would have*" dichotomy raised by Petitioners is a "distinction without a difference." (Opposition Brief, at p. 14). They could not be more wrong. This Court has previously stated that the use of deadly force constitutes an "unmatched" intrusion on a suspect's Fourth Amendment rights, *Tennessee v. Garner*, 471 U.S. 1, 9 (1985), and requires a higher level of present threat than other police uses of force. To suggest that there is *no* appreciable difference between "would" and "could" in this context is fallacious, for the former connotes a likelihood of occurrence, whereas the latter conveys only some mere probability of indeterminate size. There is a huge difference between the two concepts, and to allow a law enforcement officer to escape liability simply because it was "theoretically possible" (but not probable) that the suspect posed an imminent threat of danger to the officer or others would do violence to this Court's opinion in *Graham*.

Second, Respondents falsely claim that no court has ever identified a split of authority on the "could have" versus

"would have" issue. (Opposition Brief, at p. 15). Regardless of whether this is literally true (and, as shown below, it is not), the fact remains that some circuits do apply the "could have believed" standard, while other circuits apply the "would have believed" standard, and some circuits apply *both* standards (sometimes even in the same opinion). (Petition, at pp. 8-15). Clearly, there is a difference in the approaches taken by the federal circuit courts; enough to merit the review by this Court.

Moreover, a number of courts have acknowledged that there is a split of authority on the "would have/could have" issue in other Fourth Amendment contexts, such as examining whether, and under what circumstances, a "traffic stop" by a law enforcement officer violates the Fourth Amendment. *See, e.g., United States v. Ferguson*, 8 F.3d 385, 388 (6th Cir. 1993) (comparing the two different analytic approaches). Although this Court, in *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 1774-75 (1996), legitimized the "could have" test in assessing the reasonableness of a warrantless traffic stop, there is a world of difference between a traffic stop, on the one hand, and the use of deadly force, on the other hand, both in terms of impact to the victim and the possible consequences to the police officer. Clearly, the decision whether to use a firearm poses a much graver threat than the decision whether to execute a warrantless stop on a vehicle. Given this "life and death" difference between the two situations, a "could have believed" standard is not an appropriate test for judging the reasonableness of deadly force.

VI.

Hart Did Not Strike Any Officers During His Escape, And Any Perceived Threat Existing At An Earlier Point in Time Does Not Provide An Ongoing License to Shoot.

Finally, in arguing that the officers' use of deadly was reasonable, Respondents make the incredible assertion that